No. 87-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE FIRESTONE TIRE & RUBBER CO., et al.,
Petitioners,
vs.
RICHARD BRUCH, ALBERT SCHADE,
LEONARD A. SMOLINSKI, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Does not the content, the legislative history, and the overall purpose of ERISA mandate, <u>at a minimum</u>, that all employee benefit claim decisions falling outside of the LMRA "collective bargaining" context be subject to a non-deferential judicial standard of review?

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INTEREST OF AMICUS[1]

Amicus Plaintiff Employment Lawyers Association ("PELA") is a non-profit organization. PELA has six hundred fifty-six (656) members in forty-nine (49) states who specialize in representing employees in civil litigation concerning employment and labor matters. PELA members regularly encounter issues arising under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C 1001 et. seq. ("ERISA"). PELA is therefore uniquely positioned to offer practical insights on behalf of those for whose benefit ERISA was enacted.

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[1] This brief was filed with the consent of the parties. The evidence of such consent is on file with the Clerk of the Court pursuant to Rule 36 of this Court.

INTRODUCTORY STATEMENT

This case presents important questions about the scope of judicial review of decisions on ERISA benefit plan claims. Such claims include those for pensions, disability benefits, health care benefits, and for severance pay. Presently, such claims are subject to a deferential standard of review which places employees and their beneficiaries at a distinct disadvantage.[2] To satisfy the "substantial evidence" element of the standard,

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[2] Under the standard, a decision will be overturned only if it is "arbitrary and capricious, (2) not supported by substantial evidence, or (3) erroneous on a question of law. E.g., Wardle v. Central States Pension Fund, 627 F.2d 820 (7th Cir. 1980); Dennard v. Richards Group, Inc., 681 F.2d 306 (5th Cir. 1982); and Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1093 (9th Cir. 1985).

a benefit plan need only develop "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion ...more than a scintilla but somewhat less than a preponderance of evidence ...such evidence as would be sufficient to justify submission of the issue to a jury." Tomlin v. Bd. of Trustees of Const. Laborers, 586 F.2d 148, 151 (9th Cir. 1978). Thus, a decision can be upheld even if later shown to be wrong, despite the resulting injustice to the concerned claimant.

PELA supports the decision below to adopt a "de novo" standard of review.[3] The Third Circuit's opinion thoroughly

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[3] The decision was rendered by the Third Circuit, reversing the District Court. Said decision is reported at 828 F.2d 134.

analyzes the development of the "arbitrary and capricious" standard and its prior application to claims arising under both the Labor Management Relations Act of 1947, 29 U.S.C. 141 et seq. ("LMRA") and ERISA. Its decision to reject said deferential standard of review in certain ERISA cases reflects a careful balancing of policy considerations, which is consistent with the overall Congressional objectives in enacting ERISA.

The Third Circuit's analysis should be extended beyond the "conflict of interest" setting of this case. A non-deferential judicial standard of review should, <u>at the minimum</u>, be adopted for all ERISA cases falling outside of the "collective bargaining" context of benefit plans set up under Section

302(c)(5) of the LMRA, 29 U.S.C. Section 186(c)(5).

The Third Circuit has offered a compelling analysis of why a deferential standard of review may be appropriate under the LMRA yet flawed under ERISA. ERISA lacks the LMRA's built-in protections to police against abuses by fiduciaries. Congress clearly intended for civil actions to serve as ERISA's policing mechanisms. Such actions cannot serve this purpose, however, under the arbitrary and capricious standard. It unfairly insulates fiduciaries from accountability in all but the clearest of cases.

The Third Circuit's decision recognizes the errors of prior decisions applying the arbitrary and capricious standard.

This case now presents the Supreme Court with an extraordinary opportunity to do justice by exercising its supervisory powers to similarly correct an unwise trend to apply the deferential standard of review in ERISA benefit cases.

SUMMARY OF ARGUMENT

1. It is the overriding policy of ERISA to safeguard the well being and security of working men and women. That policy is not furthered by the arbitrary and capricious deferential standard.

2. Congress never intended that a deferential standard of review be incorporated into ERISA from the common law of trusts. In fact, the trust relationships present in ERISA benefit plans are significantly different from those found in the common law. Contract

analysis is more appropriate.

3. ERISA lacks the LMRA's built-in protections promoting impartiality. A "de novo" standard of review is therefore necessary, at least as to claims arising outside of the LMRA collective bargaining context, in order to safeguard the rights and obligations created by ERISA.

4. The arbitrary and capricious standard violates the plain meaning of the "prudent man" standard and the "exclusive benefit" rule of 29 U.S.C. 1104(a). It is inconsistent with the overall structure and legislative history of ERISA. Various cases have struggled to cope with this inconsistency, and with inequities resulting from strict adherence to this product of judicial common law. Numerous exceptions and exclusions

to the arbitrary and capricious standard have therefore developed. While they are understandable and just, these exceptions and exclusions have created a "double standard" that does little to foster important societal needs for certainty and uniformity of the law. It is time to therefore make a clean break and expressly abandon the arbitrary and capricious standard.

5. The arbitrary and capricious standard works a substantial injustice upon those for whose benefit ERISA was enacted. Workers make substantial contributions to the benefit plans in which they are participants. These include actual money payments and compensation received in the indirect form of benefit plan protections. The

deferential standard has not satisfied reasonable expectations of security and protection that the benefit plans are intended to provide. The deferential standard also fosters unequal treatment of the citizenry under the law. In the non-pension context, benefit plan participants and beneficiaries have far fewer legal rights and protections with the deferential standard than do individuals who have privately contracted for their own protection through annuities or policies of health and/or disability insurance. A "de novo" standard would help to put benefit plan claimants back on an equal footing with the rest of society.

ARGUMENT

I. IN ENACTING ERISA, CONGRESS SOUGHT TO REFORM EXISTING LAW SO AS TO BETTER SAFEGUARD THE WELL BEING AND SECURITY OF WORKING MEN AND WOMEN. ERISA IS TO BE BROADLY CONSTRUED SO AS TO GIVE EFFECT TO THAT PURPOSE.

This brief relies upon a recent, comprehensive reference study of ERISA, of its legislative history, and of its interpretive cases.[4] In discussing ERISA's intended policy, the study observes that Congress expressed dissatisfaction with the pre-existing law's ability to "adjust inequities visited upon plan participants."[5]

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[4] S. Bruce, "Pension Claims: Rights and Obligations" (BNA, 1988).

[5] Id., Chapter 7, page 314, citing to S. Rep. 93-127, at 5, 1 ERISA Leg. Hist. 591 and H.R. Rep. 93-533 at 5, 2 ERISA Leg. Hist. 2352.

Continuing, the author notes that both the Senate Committee on Labor and Public Welfare and the House Education and Labor Committee reports on ERISA observed that "courts strictly interpret the plan indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording."[6]

The Congressional leaders adopting ERISA viewed pensions as a form of deferred compensation to be safeguarded. They viewed ERISA benefits as a matter of contract right, and took steps to make pension plans more viable contracts.[7] That view is undermined by an "arbitrary

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[6] Id.

[7] Id., at page 315-16, quoting from legislative history.

and capricious" standard of review.[8]

ERISA's statement of Congressional Findings and Declarations of Policy also reflects an intent to <u>improve</u> the rights of workers. For example, 29 U.S.C 1001(b) states that it is ERISA's intended policy to protect "the interests of participants in employee benefit plans and their beneficiaries by ... [among other things] establishing standards of conduct, responsibility, and obligation for fiduciaries of emplcyee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to

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[8] Id., at pages 314-15, referencing remarks by Senators Harrison Williams and Jacob Javits, two chief Senate leaders and sponsors of ERISA, as well as comments by Representative Carl Perkins, who was the Chairman of the House Education and Labor Committee when ERISA was enacted.

the federal courts." (bracketed material added.)

Congress reiterated its intent by adopting the "prudent man" standard of care for ERISA fiduciaries, mandating that they discharge their duties "solely in the interest of the participants and beneficiaries ..."[9] Congress also made

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[9] This "prudent man" standard is found at 29 U.S.C. 1104 (a). In pertinent part, it provides:

"(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would

clear that ERISA's provisions were to be broadly construed, consistent with its underlying purposes. Thus, Senate Report Number 93-127 states: "It is intended that coverage under the Act be construed liberally to provide a maximum degree of protection to working men and women covered by private retirement programs." Reprinted in [1974] 3 U.S. Code Cong. & Admin. News, page 4854.

The courts have uniformly recognized ERISA's remedial purposes, holding that it is to be liberally construed so as to safeguard the well being and security of working men and women.[10]

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use in the conduct of an enterprise of a like character and with like aims . . ."

[10] E.g., Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 589 (9th Cir. 1984), Amato v. Western Union Intl., Inc., 773

II. ERISA'S POLICY IS NOT FURTHER BY A DEFERENTIAL STANDARD OF REVIEW. CONGRESS NEVER INTENDED THAT SUCH A STANDARD BE IMPORTED FROM THE COMMON LAW OF TRUSTS. PRIOR CASES ADOPTING SUCH A STANDARD SHOULD BE REJECTED.

When a benefit plan administrator interprets benefit plan provisions and makes determinations on individual benefit claims, he is functioning as a fiduciary.[11] Although ERISA provides fiduciaries with some discretionary authority, Congress never intended to insulate fiduciaries from accountability. Congress would not have mandated a strict, "prudent man" standard of care if fiduciary decisions were to be so

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F.2d 1402, 1409 (2d Cir. 1985), and Rettig v. PBGC, 744 F.2d 133, 135 (D.C. Cir. 1984).

[11] 29 U.S.C. 1102(a).

insulated.[12] ERISA's structure instead demonstrates that fiduciaries are to be fully accountable for their actions. It provides a mechanism for remedying fiduciary violations, by providing ready access to the courts.[13] Congress encouraged civil actions to remedy fiduciary misconduct by authorizing awards of attorney fees to claimants in litigation. Congress also provided for a very lengthy statute of limitations for

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[12] 29 U.S.C. 1104(a).

[13] 29 U.S.C. 1132(a)(1)(B) authorizes actions not only to recover benefits, but also to enforce other rights and clarify the right to future benefits. 29 U.S.C. 1132(f) emphasizes the importance attached by Congress to encouraging actions to safeguard rights under ERISA: it provides for jurisdiction in the district courts "without respect to the amount in controversy or the citizenship of the parties . . ."

actions based upon a fiduciary's breach of "any responsibility, duty, or obligation." 29 U.S.C 1113(a). (emphasis added.)

Despite this clear expression of legislative intent, the courts have nevertheless generally applied an "arbitrary and capricious" standard of review in examining the claims decisions of ERISA fiduciaries. The Third Circuit is to be commended for its exhaustive examination of how the arbitrary and capricious standard originated under the LMRA and was thereafter extended to employee benefit cases under ERISA.[14]

The Third Circuit has correctly observed significant differences between

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[14] See 828 F.2d at pages 138-45.

benefit plans arising under the LMRA and ERISA. The LMRA sets out elaborate requirements intended to protect the benefit plans it authorizes from being controlled by a party biased toward either the employees or employer. In contrast, ERISA has no such protections. The briefs of Petitioners and their Amici fail to fully address this aspect of the Third Circuit's analysis. They instead focus on the common law of trusts. They contend that it mandates a deferential standard and that Congress intended for it to form the exclusive basis for the review of a fiduciary's decisions.

Petitioner's argument is based upon an incomplete examination of legislative history, and also upon an incomplete analysis of the common law of trusts.

ERISA's "prudent man" standard, and a "de novo" standard of review, are in fact consistent with the common law of trusts.[15] In fact, Congress recognized and intended that ERISA would involve modifications and alterations of common law trust concepts. The committee reports observed that employee benefit plans are very different from the testamentary and inter vivos trusts upon which trust law was founded.[16] Scholarly

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[15] See Donovan v. Mazzola, 716 F.2d 1226, 1231 (9th Cir. 1983), cert. denied 464 U.S. 1040 (3d Cir. 1984). This case found the "prudent man" standard to be mandated by ERISA's explicit language and legislative history. It also found the test to be consistent with the common law of trusts, citing III Scott on Trusts Section 187.2 at 1514 and n.2; Sections 227-227.3, at 1805-12.

[16] "Pension Claims: Rights and Obligations," supra, at page 317, including footnote 84.

studies have concluded that "the balancing of conflicting interests of current and future claimants that supported the arbitrary and capricious standard under traditional trust law is absent under ERISA."[17]

ERISA, unlike the LMRA, has no equal representation requirements to assure that the plan fiduciaries are impartial. In fact, the non-LMRA benefit plans are typically controlled by the employer, and not by a group evenly divided between employer and employees. The employer adopts the governing Plan document, and selects and often supervises the Plan fiduciaries. Employees have little or no

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[17] Id., at page 317-18, citing R. Gilbert, "Fiduciary Duties Under ERISA," 43 Inst. on Fed. Tax'n, at 33-6 (1985).

voice, and must typically rely upon the good faith of the employer and plan administrators. In this non-LMRA context, there is a significant danger that the plan fiduciaries will not be impartial, particularly if the fiduciary's decision has a direct or indirect financial impact upon the employer. ERISA's only real safeguard against such bias is civil litigation by aggrieved benefit plan claimants. A "de novo" standard of review is therefore essential if such actions are to effectively police fiduciary conduct.

A "de novo" standard of review is consistent with the Congressional objective of fiduciary standards which are "more exacting" than that found prior

to ERISA.[18] A "de novo" standard also conforms to the Congressional committee report statement that ERISA fiduciary standards should be interpreted "bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act."[19]

Petitioners and their Amici argue that other mechanisms can insure that fiduciaries comply with the minimum requirements of ERISA. The experience of PELA members is much to the contrary, however. Defense interests enjoy many

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[18] Donovan v. Mazzola, supra, 716 F.2d at 1231.

[19] S. Rep. 93-127, at 29, 1 ERISA Leg. Hist. 615; H.R. Rep. 93-533, at 29, 2 ERISA Leg. Hist. 2359; and Conf. Rep., at 302, 3 ERISA Leg. Hist. 4569. Each is discussed at page 317 of "Pension Claims: Rights and Obligations," supra.

advantages in ERISA litigation. Combined with the arbitrary and capricious standard, those advantages make ERISA litigation a perilous undertaking for benefit plan claimants. Unsophisticated plaintiffs have their claims dismissed for failure to first exhaust administrative remedies;[20] ERISA claims generally are not subject to trial by jury;[21] when a claims decision is shown

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[20] Claimants must exhaust ERISA administrative remedies as a prerequisite to filing suit. E.g., Amato v. Bernard, 618 F.2d 559, 567-68 (9th Cir. 1980); Denton v. First National Bank, 765 F.2d 1295, 1303 (5th Cir. 1985); Mason v. Continental Group, Inc., 763 F2d 1219, 1227 (11th Cir. 1985).

[21] In re Vorpahl, 695 F.2d 318 (8th Cir. 1982); Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980); and dicta in Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1984), cert. denied, 449 U.S. 1112.

to violate ERISA, the remedy is typically only a remand for further administrative proceedings, rather than relief on the merits;[22] extra-contractual damages are generally not available to provide full relief and to make contingency representation by counsel feasible;[23] and attorney fee awards have not filled in the resulting gap.[24]

III. THE ARBITRARY AND CAPRICIOUS STAN-DARD VIOLATES THE "PLAIN MEANING" RULE OF STATUTORY CONSTRUCTION. IT IS INCONSISTENT WITH ERISA's OVERALL STRUCTURE AND LEGISLATIVE HISTORY. THE COURTS HAVE STRUG-GLED TO COPE WITH IT. THE RESULT HAS BEEN A COMPLICATED BODY OF CASE LAW, WITH MANY EXCEPTIONS TO THE DEFERENTIAL STANDARD. THE COURT SHOULD RESTORE CERTAINTY AND UNIFORMITY TO THE LAW, BY ELIMINATING THE ARBITRARY AND CAPRICIOUS STANDARD.

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[22] Blau v. Del Monte Corp., supra, 748 F.2d at page 1353; Wolfe v. J.C. Penney Co., 710 F.2d 388, 393 (7th Cir. 1983).

[23] Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, (1985) foreclosed the recovery of extra-contractual damages under 29 U.S.C. 1109, and Circuits have since held that such damages are not available in other ERISA actions. E.g., Sokol v. Bernstein, 803 F.2d 532, 534-38 (9th Cir. 1986); Powell v. C. & P. Tel. Co. of Virginia, 780 F.2d 419, 424 (4th Cir. 1985), cert. denied 476 U.S. 1170 (1986).

[24] Few attorneys can afford to represent ERISA claimants based on hopes of a discretionary fee award under 29 U.S.C. 1132(g). See "Pension Claims: Rights and Obligations," supra, at 675-77. The standards for awarding fees have only recently been settled. E.g., Pennsylvania, et al. v. Delaware Valley Citizens' Council for Clean Air, et al., ____U.S._____, 106 S. Ct. 3088 (1986) ("Delaware Valley I") and Pennsylvania, et al. v. Delaware Valley Citizens' Council for Clean Air, et al., _____U.S. ___, 107 S. Ct. 3078 (1987) ("Delaware Valley II"). How the Circuits will apply the standards to ERISA remains to be seen.

This honorable Court has found that ERISA seeks to comprehensively regulate employee pension and welfare plans.[25] When faced with issues of statutory interpretation under ERISA, despite ERISA's acknowledged statutory complexity,[26] the Court has felt compelled "to begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Metropolitan Life Ins. v. Massachusetts, supra, 471 U.S. at Page 740. In construing ERISA, the court has also found it helpful to look to the overall structure of the Act, and at ERISA's legislative history. Finally, the court has firmly rejected any "blue pencil" method of statutory construction under ERISA, and has instead insisted that ERISA's provisions be interpreted in "the relevant contexts in which statutory language subsists." Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085 (1985). Other rules of statutory construction applicable to ERISA are summarized well in Amato v. Western Union Intern., Inc., 773 F.2d 1402, 1408 (2d Cir. 1985). These guiding principles of construction are all relevant in considering the proper

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[25] Pilot life Ins. Co. v. Dedeaux, ___U.S.____, 107 S.Ct. 1549 (1987); Shaw v. Delta Airlines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 2896 (1983), and Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 732, 105 S.Ct. 2380 (1985).

[26] ERISA is a "comprehensive and reticulated statute." Nachman Corp. v. PBGC, 446 U.S. 359, 361, 100 S.Ct. 1723 (1980).

standard of judicial review for benefit claim decisions by ERISA fiduciaries.

A deferential standard of judicial review ignores the plain language of 29 U.S. 1104(a), and also violates the Court's "blue pencil" prohibition. Such a standard of review is also inconsistent with the overall structure of the Act, because it tends to defeat and render superfluous the "six carefully-integrated civil enforcement provisions found in section 502(a) of the statute [29 U.S.C. 1132(a)] ...." Mass. Mutual Life Ins. Co. v. Russell, supra, 473 U.S. at page 146. The civil enforcement mechanisms can do little to safeguard the rights of employees when a deferential standard of judicial review is employed.

Many courts have struggled with the

obvious inequities of the arbitrary and capricious standard of review. Those inequities were discussed as follows by one district court judge, regarding the Fifth Circuit's adoption of the deferential standard in Bayles v. Central States, Southeast, etc., 602 F.2d 97, 99 (5th Cir. 1979):

> "That holding perplexes this court. It allows an employer to breach his employee's compensation contract with impunity, so long as the employer does not do so in an "arbitrary or capricious" manner. The administrator may be stupid, or simply ignorant, or ill-advised on the meaning of the contract. No matter. He may breach and breach again, yet the employee cannot enforce his rights.
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> With the social security retirement system in a shambles and its bankruptcy imminent, private benefit plans offer most workers their only hope of security in old age or disability. To an older worker, his pension rights may be more valuable than his salary. He can enforce those valued rights however, if and only if he can prove

> the contract's breach to be 'arbitrary and capricious' ...The court believes that disputes over employment contracts - including pension and disability benefit plans - are most rationally, economically, and equitably resolved by the application of traditional contract principles. It is, after all, a contract the Court is being asked to interpret. ...Basic contract concepts and terms do not, of course, convey absolutely precise meaning. But they carry substantially more meaning than the slippery concept of 'arbitrary and capricious'. Requiring that 'standard' of review makes for a paucity of legal analysis. It substitutes conclusory phrases for specific supporting factual determinations."[27]

Imaginative counsel and courts have developed "refinements" or "exceptions" to the arbitrary and capricious standard,

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[27] Hayden v. Texas - U.S. Chemical Co., 557 F. Supp. 382, 389-90 (E.D.Tex. 1983) on remand from, 681 F.2d 1053 (5th Cir. 1982). This case is discussed at pages 322-24 of "Pension Claims: Rights and Obligations," supra.

in an attempt to avoid overly harsh results.[28] Thus, decisions interpreting benefit plan provisions have been held to be "arbitrary and capricious" where they depend upon a plan interpretation which is inconsistent with the "plain meaning" of the plan document.[29]

Similarly, the courts have overturned interpretations differing from a benefit

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[28] "Pension Claims: Rights and Obligations," supra, at pages 324-46, beginning with a discussion of Dennard v. Richards Group, Inc., 681 F.2d 306 (5th Cir. 1982).

[29] Id., at pages 325-26, including citations to Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984) cert. denied, 474 U.S. 865 (1985) and Morgan v. Mullins, 643 F.2d 1320 (8th Cir. 1981).

plan's past practice or custom.[30] Still other courts have required strict procedural compliance by plan fiduciaries as a prerequisite to application of the arbitrary and capricious standard.[31] Still other classes of ERISA cases appear to have abandoned the arbitrary and capricious standard of review altogether.[32] These cases specifically

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[30] Id., at pages 328-30, including a citation to Kann v. Keystone Resources, Inc. Profit Sharing Plan, 575 F. Supp. 1084 (W.D.Pa. 1983).

[31] Id., at pages 343-45, including citations to Struble v. New Jersey Brewery Employee's Welfare Fund, 732 F.2d 325 (3d Cir. 1984), Blau, supra, and Short v. Central States Pension Fund, 729 F.2d 567 (8th Cir. 1984).

[32] Id., at pages 358-64. Cited case examples include Central Hardward Co. v. Central States Pension Fund, 770 F.2d 106 (8th Cir. 1985), cert. denied, 475 U.S. 1108 (1986) and Struble v. New Jersey Brewery Employees Welfare Fund, supra.

involve issues of trustee authority, interpretations of single-employer collectively bargained plans, some insurance contracts, and class interpretations.

Despite these exceptions and "refinements", the vast majority of individual benefit claims under ERISA are still subjected to a deferential standard of review. Thus, the courts frequently find themselves treating classes of ERISA cases differently, despite the fact that each such case is subject to the same governing statute. The result is a chaotic lack of uniformity and certainty under the law. The situation therefore merits this court's supervisory intervention.

IV. A DEFERENTIAL STANDARD FAILS TO MEET THE REASONABLE EXPECTATIONS OF EMPLOYEES. IT CREATES A DOUBLE STANDARD THAT CONGRESS COULD NOT HAVE ENVISIONED OR INTENDED. BENEFIT PLAN PARTICIPANTS AND BENEFICIARIES END UP WITH FEWER RIGHTS AND PROTECTIONS THAN DO INDIVIDUALS WHO HAVE SEPARATELY CONTRACTED FOR PROTECTION THROUGH POLICIES OF INSURANCE.

As was noted above, the drafters of ERISA sought to treat employee benefits as being a form of compensation. A substantial percentage of ERISA welfare benefit plans are at least partially funded by direct contributions from employees. Thus, the 1986 Johnson and Higgins Corporate Health Care Benefits Survey ("Survey") shows that nationwide over 40% of employers require employees to contribute toward insurance premium for health care benefits for themselves, and approximately 70% require employees

to contribute toward premiums for dependant coverage. (Survey, Pages 26-27). The Hewitt Associates Salaried Employee Benefits Provided by Major U.S. Employers in 1986 ("Study") shows that nationwide 74% of large employers, a group including 96% of the Fortune 100 industrials, require employee contributions either for employee or dependant medical care coverage. (Study, Page 27). Moreover, the Hewitt Associates Salaried Employee Benefits Provided by Major U.S. Employers: A Comparison Study, 1981 through 1986 ("Comparison Study") shows that nationwide during a recent five year period, there was a marked trend for ERISA health care plans toward requiring employee contributions - an additional 10% of large employers have now imposed

such a requirement (Comparison Study, Page 29).

The employees who participate in these ERISA benefit plans view such participation as a substitute for private insurance. They are making direct "out of pocket" payments expecting to obtain the same protection that one's private insurance affords. By definition, such participation gives rise to reasonable expectations of security and protection in an event of an incident giving rise to a claim. The analysis above, however, demonstrates that the arbitrary and capricious standard of review can lead to results which do not meet the individual employee's reasonable expectations.

In contrast, the individual who privately contracts for his own health,

disability, or annuity insurance receives far better treatment from the courts in the event of litigation over a disputed claim. Such disputes fall outside the scope of ERISA, and are subjected to a "preponderance of the evidence" test.[33] The courts apply principles of contract analysis to such disputes.

Surprisingly, there has been little discussion of this "double standard" in the law's treatment of its citizenry in reported ERISA decisions. It seems highly unlikely that Congress could have intended such a result, in view of the clear statements that ERISA was intended

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[33] See Couch on Insurance 2d (Rev. Ed.) Section 79:314-19, cited on Page 365 of "Pension Claims Rights and Obligations", supra.

to provide employees with increased security and protection.

Ultimately, this "double standard" will operate to discourage individual participation in ERISA group benefit plans, contrary to the intent of Congress. Unfortunately, the average worker often does not realize or appreciate the impact of this "double standard" until after the incident giving rise to his/her claim occurs. It is then too late for the employee to make alternate arrangements for security and protection. A decision to abandon the arbitrary and capricious standard of review would help to eliminate the "double standard" and place all citizens with benefit claims on equal footing in the eyes of the law.

CONCLUSION

The arbitrary and capricious standard is an anomaly which runs counter to the clear purpose and intentions of Congress in enacting ERISA. In operation, it is inherently unjust. A "de novo" standard of review is more appropriate, and was properly applied in the proceedings below. The decision of the Third Circuit should therefore be upheld.

Respectfully submitted,

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